614665

614665

81556-9

No. 61466-5-I

DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

Hon. MICHAEL F. MORGAN, Individually and in his Official Capacity as Presiding Judge of the Municipal Court of Federal Way,

Petitioner/Appellant/Cross-Respondent

v.

CITY OF FEDERAL WAY, a code municipality; and the CITY ATTORNEY FOR FEDERAL WAY,

Respondents/Cross-Appellants

and

TACOMA NEWS, INC. d/b/a THE NEWS TRIBUNE,

Intervenor/Respondent

ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. Kimberly Prochnau)

REPLY BRIEF OF APPELLANT AND BRIEF OF CROSS-RESPONDENT

John B. Schochet
WSBA No. 35869
DORSEY & WHITNEY LLP
Attorneys for Petitioner/Appellant Michael F. Morgan, Presiding Judge of the Municipal Court of Federal Way

Dorsey & Whitney LLP
1420 Fifth Avenue, Suite 3400
Seattle, WA 98101
Telephone: (206) 903-8800
Facsimile: (206) 903-8820

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

I. INTRODUCTION TO REPLY

Respondents have attempted to make this an appeal about "the public['s] . . . interest in the performance of elected officials," arguing that "voters have an interest in all information that will assist them in making their votes." Executive Branch's Br. at 40-41; *see also* Tacoma News's Br. at 20-22. This is a distortion of the legal issues controlling this case. This appeal is *not* about Judge Morgan individually, nor is it about the 2009 Federal Way judicial election; it *is* about the Federal Way Municipal Court's right to administer itself and its workplace as the independent Judicial Branch of the City of Federal Way. The fact that the Municipal Court often shares an attorney with the Executive/Legislative Branch of the City of Federal Way should in no way diminish the independence of the Court. In addition to the important judicial independence and separation of powers issues this case raises, the Municipal Court also seeks to protect its right to assert work product protection, attorney-client privilege, and personal records protection over a document that falls into all three of these categories.

To the extent the Executive Branch and Tacoma News are concerned with the public's interest in knowledge about the Federal Way Municipal Court, Tacoma News and other media outlets have ample opportunities to obtain information about the Court (as well as any other

arm of state or local government) without demanding release of a report that is work product, attorney-client privileged, and not covered by the Public Records Act ("PRA"). The information contained in the Stephson Report is not "secret"—the report consists largely of quotes or statements made by current and former Municipal Court employees. Tacoma News is free to contact current and former Municipal Court employees and ask them to share their views of the Municipal Court and its workplace.[1] In addition, insofar as Respondents are arguing that the electorate should be apprised of any allegations made against Judge Morgan (or any other elected judge in this state), the Washington Constitution already provides that the Commission on Judicial Conduct ("CJC") fulfills this purpose. *See* Wash. Const. art IV, § 31 (empowering the CJC to investigate complaints against judges "and then conduct initial proceedings for the purpose of determining whether probable cause exists for conducting a public hearing or hearings to deal with the complaint or belief). The Constitution specifically states that "[t]he investigation and initial proceedings shall be confidential." *Id.*

[1] Two attorneys, Amy Plenefisch and Amy Stephson, prepared two separate investigative reports regarding the Municipal Court's workplace in January and February 2008. *See* CP 161-74, 179-87. Tacoma News has only gone to court to seek production of one of those two reports. It is the Municipal Court's position that both reports are protected by attorney-client privilege; but it is unclear why Tacoma News, not having reviewed either report, insists that the Stephson Report is not privileged while making no such claim regarding the Plenefisch Report.

First and foremost, this is a judicial independence case, not a public records case. Because the Stephson Report addresses only Municipal Court workplace matters—matters that are the non-delegable responsibility of Presiding Judge Morgan pursuant to GR 29(f)—the Stephson Report is exclusively a Municipal Court document not subject to the PRA. The fact that City Attorney Richardson commissioned the report in her capacity as the Municipal Court's attorney does not make it any less of a Municipal Court document, and it does not make the report subject to the PRA. And even if this Court determined that the Stephson Report was subject to the PRA, the Stephson Report is exempt as work product, attorney-client privilege, and a personal record. Any one of these arguments is independently sufficient to protect the Stephson Report from release to Tacoma News.

As for the Executive Branch's cross-appeal on fees, the Executive Branch functionally ignores the abuse of discretion standard of review. The Superior Court has the discretion to award fees incurred in lifting a temporary restraining order. Here, the Superior Court exercised its discretion and declined to award fees to the Executive Branch. The Executive Branch might disagree with the Superior Court's decision, but it presents no serious argument as to why not awarding fees was an abuse of discretion, i.e., "manifestly unreasonable" or "based on untenable reasons

or grounds." This Court should affirm the Superior Court's decision denying the Executive Branch's request for fees.

Finally, a note about terminology: While Judge Morgan previously used the term "the City" to refer to the Executive/Legislative Branch of the City of Federal Way, see Judge Morgan's Br. at 8, this usage has proved insufficiently precise given Respondents' insistence on using that same term in a deliberately ambiguous manner. *See* Executive Branch's Br. at 1 (defining "City" as "The City of Federal Way"); Tacoma News's Br. at 1 (same). This is not a dispute between Judge Morgan and the "City"—it is a dispute between the Federal Way Municipal Court (i.e., the City's Judicial Branch, acting through its administrative decision-maker, Presiding Judge Morgan) and the Executive Branch of the City (acting through the City Council and the City Manager).[2] Therefore, for the sake of precision and clarity, Judge Morgan will refer to the Executive Branch of the City of Federal Way as the "Executive Branch."

[2] The Executive Branch of the City of Federal Way is a combined executive and legislative branch because of Federal Way's council-manager form of government. In connection with this legal proceeding, that branch is functioning primarily as the City's Executive Branch, and it will be referred to as such in this brief.

II. REPLY ARGUMENT

A. The Stephson Report is a Municipal Court document not subject to the Public Records Act.

In essence, the Executive Branch and Tacoma News argue that the Stephson Report is an Executive Branch document because the Executive Branch had a copy of the report. This argument is contrary to the evidence in the appellate record. Nothing in the record shows that anyone other than Judge Morgan, City Attorney Richardson, and Stephson (the latter two acting in their capacities as the Municipal Court's attorneys), used or possessed the Stephson Report. Because the Stephson Report was only "prepared, owned, used, or retained" by the Municipal Court and its attorneys, it is a Municipal Court document not subject to the PRA.

Neither the Executive Branch of the City nor Tacoma News disputes that, under *Nast v. Michaels*, 107 Wn.2d 300, 730 P.2d 54 (1986), and *Spokane & Eastern Lawyer v. Tompkins*, 136 Wn. App. 616, 150 P.3d 158, *rev. denied* 162 Wn.2d 1004 (2007), Municipal Court documents are not subject to the PRA. The Executive Branch acknowledges this explicitly, *see* Executive Branch's Br. at 18-19, and Tacoma News does not challenge this legal rule.[3] Instead, the Executive Branch calls this a

[3] Tacoma News argues that Judge Morgan "bears the burden of establishing that the records fall within the terms of a specific exemption" to the PRA and that Judge Morgan must meet RCW 42.56.540's requirements for an injunction. *See* Tacoma News's Br. at 11-13. Judge Morgan does not dispute that these requirements apply to his

"factual" case, asking whether "the Stephson Report [is] a City [i.e., Executive Branch] record subject to the PRA or . . . exclusively a court record, not subject to the PRA?" Executive Branch's Br. at 19. This is not a "factual" question—what the Executive Branch attempts to characterize as "factual" is in fact a legal issue.[4] The Executive Branch misuses the term "the City" to refer not only to the Executive Branch, but also to City Attorney Richardson, who was at times acting as the attorney for the Municipal Court in January and February 2008. This misunderstanding of the City Attorney's role is central to the flaws in both the Executive Branch's and Tacoma News's arguments.

The City Attorney typically serves as legal counsel for *both* branches of the City of Federal Way—the Executive/Legislative Branch and the Municipal Court. In connection with some matters, the City Attorney jointly represents both branches; in connection with other matters, the City Attorney just represents one branch or the other.[5] Here,

---

arguments that the Stephson Report is exempt from the PRA as an attorney-client privileged communication, attorney work product, and a personal record. As explained, however, these requirements do not apply unless the Stephson Report was an Executive Branch document, which it is not. *See* Judge Morgan's Br. at 19-20.

[4] To the extent this appeal presents factual issues, however, this Court still reviews those factual issues de novo. *See Spokane & Eastern Lawyer*, 136 Wn. App. at 159-60.

[5] This arrangement is not unique to the City of Federal Way. County prosecuting attorneys and the state Attorney General also represent all branches of county and state governments—including the courts—sometimes together and sometimes separately.

when she hired Stephson and oversaw the preparation of the Stephson Report in response to the Municipal Court hostile workplace allegation, the City Attorney was acting exclusively as the attorney for the Municipal Court because, under GR 29(f), the Municipal Court, through Presiding Judge Morgan, has exclusive, non-delegable authority over and responsibility for non-wage related Municipal Court employment matters.

There is no dispute that the City Attorney "prepared, owned, used, or retained" the Stephson Report. As explained in Judge Morgan's brief, however, the City Attorney's possession of a Municipal Court document in the course of her work as legal counsel for the Municipal Court does not make a court document into a public record. *See* Judge Morgan's Br. at 32-34. If City Attorney Richardson's status as an Executive Branch employee somehow "transformed" any court documents that crossed her desk in connection with her legal work for the court into Executive Branch documents, courts in this state would no longer be able to use city attorneys, county prosecuting attorneys, or the Attorney General's Office as judicial branch legal counsel without effectively eliminating the judiciary's ability to manage itself independently of state, county, and municipal executive branches. *See id.* In other words, when an attorney is performing legal work for a court, that attorney is working for the judiciary, even if he or she receives a paycheck, office supplies, and even

other legal work (in other matters) from an executive branch. City Attorney Richardson's possession of the Stephson Report, therefore, does not make the report an Executive Branch document subject to the PRA.

When the Executive Branch and Tacoma News claim that "the Stephson Report was prepared, used, owned and retained by the City," Executive Branch's Br. at 20, and that "[t]he City has [the Stephson Report] and the City is subject to the PRA," Tacoma News's Br. at 22, they really mean that the City Attorney has possession of the Stephson Report. By making oblique references about "the City," the Executive Branch and Tacoma News attempt to obscure the critical distinction between the City Attorney (acting in her capacity as attorney for the Municipal Court) and the Executive Branch. Every time the Executive Branch cites a portion of the record to show that "the City" took some action, the record shows that "the City" actually means City Attorney Richardson. *See* Executive Branch's Br. at 20, 22-23 (citing CP 71 ¶8, 189, 191, 279).[6] Although Tacoma News also alleges that "the City has"

[6] In CP 71, City Attorney Richardson states that "*I* instructed Ms. Stephson to complete her report" (emphasis added), CP 189 and CP 191 are both direct communications from Richardson to Judge Morgan (not copied to the Executive Branch), and, in CP 279, Richardson refers to her own actions in directing Stephson to complete her report. Nothing in the record suggests that the Stephson Report was ever "prepared, owned, used, or retained" by anyone in the Executive Branch other than the City Attorney acting in her capacity as the Municipal Court's attorney. Therefore, *Concerned Ratepayers Ass'n v. Public Utility Dist. No. 1*, 138 Wn.2d 950, 959, 983 P.2d 635 (1999), *cited by* Executive Branch's Br. at 20, which states that "[a] document relating to a governmental function is 'used' by the agency if it is applied to a given purpose or

the Stephson report, it cites nothing in the record to support this assertion.[7] In short, the Stephson Report was only "prepared, owned, used, or retained" by the Municipal Court and its attorneys (Stephson and City Attorney Richardson), and the report is a Municipal Court document not subject to the PRA.

The Executive Branch then argues that it "had independent grounds for conducting the Stephson investigation" and "instigated the investigation pursuant to its own Anti-Harassment Policy . . . ." Executive Branch's Br. at 20.[8] This argument is both irrelevant and inaccurate. It is irrelevant because the record shows that the City Attorney—not the City Manager or someone else in the Executive Branch—hired Stephson and

---

instrumental to an end or process," is irrelevant. Since the Stephson Report was, if anything, only "applied to a given purpose" by the City Attorney acting in her capacity as the Municipal Court's attorney, the Stephson Report is not an Executive Branch document and is not subject to the PRA.

[7] Tacoma News asserts that "neither [Judge] Morgan nor the municipal court even had a complete copy of the report" and that "[Judge] Morgan does not know the identity of the complaining employee." Tacoma News's Br. at 22. Tacoma News does not cite the record to support this assertion. The only source Tacoma News cites, footnote 2 of Judge Morgan's brief, states that neither the hostile workplace allegation itself nor the name of the complaining employee are in the record. This is true. However, the fact that neither of these items are in the record has no bearing on whether Judge Morgan "know[s] the identity of the complaining employee." Tacoma News also asserts that "[Judge] Morgan first received a redacted copy of the Stephson report during this litigation . . . ." *Id.* This is inaccurate. In fact, Judge Morgan received a copy of the Stephson Report before this proceeding was filed. *See* CP 10-11, 399.

[8] City Attorney Richardson's declaration and the Executive Branch's motion to seal both refer to the document at CP 400-403 as an "antidiscrimination policy." *See* CP 71, 89, 93, 97, 114. In its appellate briefing, the Executive Branch is now referring to that same document as an "Anti-Harassment Policy." *See* Executive Branch's Br. at 20. Judge Morgan will continue to refer to that document as the antidiscrimination policy except when quoting other parties' briefing.

commissioned her investigation and report. City Attorney Richardson sought Judge Morgan's approval to retain Stephson, and nothing in the record suggests that Richardson also sought the approval of any Executive Branch officials or City Council members. *See, e.g.*, CP 189, 191. Consequently, even if the Executive Branch thought it could have "had independent grounds for conducting the Stephson investigation," the investigation was conducted and overseen by attorneys working for the Municipal Court, and the report prepared as a result of that investigation remains a Municipal Court document.

The Executive Branch's "independent grounds" argument is inaccurate because nothing in the record suggests that the Executive Branch (as opposed to the City Attorney) ordered or oversaw the preparation of the Stephson Report, and the "independent grounds" the Executive Branch conjures up to justify claiming an "interest" in the Stephson Report ignore the plain language of GR 29(f). The Executive Branch proposes three "compelling interests" it claims could have justified an Executive Branch investigation of the Municipal Court's workplace, none of which are valid:

First, the Executive Branch claims it had a "direct financial interest" in the Municipal Court's workplace. *See* Executive Branch's Br. at 21. While the Executive Branch could be financially responsible for

any judgment entered against the Municipal Court, that alone would not justify the Executive Branch unilaterally investigating the Municipal Court. As explained in Judge Morgan's brief, the Executive Branch effectively plays the role of a liability insurer for the Municipal Court on workplace issues—not only does GR 29(f) explicitly give the Presiding Judge responsibility for "working conditions, hiring, discipline, and termination decisions except wages" of "[a]ll personnel employed under the judicial branch of government," the Presiding Judge *may not* delegate these responsibilities to the Executive Branch. *See* Judge Morgan's Br. at 20-23. There is nothing whatsoever in the record to suggest that the Executive Branch ever used or intended to use the Stephson Report to "evaluate its exposure." Executive Branch's Br. at 21 n.6. This assertion is unsupported speculation, and it is not a "justification" for the Executive Branch's after-the-fact claimed interest in the Stephson Report.[9]

[9] The Executive Branch asserts that "an employer—the City—[is] automatically liable for a supervisor's discriminative conduct unless the employer has an Anti-Harassment Policy, it promptly conducts an investigation of any claims, and takes prompt remedial action." Executive Branch's Br. at 30. In fact, it is far from clear whether or how the Executive Branch would be liable as "the employer" for conduct by a Municipal Court supervisor when GR 29(f) explicitly strips the Executive Branch of any control over the Municipal Court's workplace conditions. The Executive Branch might ultimately be financially responsible for any liability of the Municipal Court, but the Executive Branch has no control over workplace conditions and therefore does not meet the traditional definition of "employer." *See* Judge Morgan' Br. at 21-22, 25 n.7. As such the Executive Branch is not liable *as "an employer"* for any workplace claims brought by Municipal Court employees.

Second, the Executive Branch asserts that it "could have taken action pursuant to its Anti-Harassment Policy to remedy any improper conduct to limit its liability . . . ." Executive Branch's Br. at 21. The only "action" the Executive Branch claims it could have taken, however, is offering a Municipal Court employee a position in the Executive Branch. *See id.* This speculation is without support in the record,[10] and it is legally immaterial. While the Executive Branch controls and conducts its own hiring independently of the Municipal Court's hiring (subject, of course, to its union contracts and other personnel policies), *see* GR 29(f), the possibility that the Executive Branch might under certain circumstances offer a job to a Municipal Court employee does not give the Executive Branch the authority to investigate Municipal Court workplace conditions. What the Executive Branch suggests would be a gross violation of GR 29(f) and separation of powers. Based on the Executive Branch's theory, the Governor's Office could unilaterally "investigate" a workplace complaint by a Washington Court of Appeals staff member as long as the Governor would consider offering the court staff member a position in the Governor's Office. An executive branch investigation of the judiciary's

[10] No party originally asserted that the Executive Branch could offer a Municipal Court employee an Executive Branch position; the Superior Court offered this suggestion *sua* sponte at the March 19, 2008 hearing. *See* RP (Mar. 19, 2008, Decision) at 13. Neither the Superior Court nor the Executive Branch cited any factual evidence to support this theory, nor is there any such evidence in the record.

workplace would violate the separation of powers at the state level, and it would also violate the separation of powers at the municipal level. As such, the Executive Branch's assertion that it "could have taken actions" in response to an investigation of the Municipal Court is both factually unsupported and legally wrong.

Third, the Executive Branch now suggests (for the first time on appeal) that it might consider eliminating the Municipal Court based on what it terms "the claim against the presiding judge." Executive Branch's Br. at 22.[11] There is no support for this after-the-fact speculation in the record; indeed, the City Council's appointment of Judge David Larson to replace former Judge Hartl directly contradicts the Executive Branch's suggestion that the City Council was considering eliminating the Municipal Court.

---

[11] The Executive Branch's reference to the hostile workplace allegation as a "claim against the presiding judge" is misleading and unsupported by the record. It is not apparent from the record who was the subject of the original reference to the "ongoing stress and a hostile workplace environment." *See* CP 11, 37, 70-71, 161-74. Judge Morgan was *not* the only manager at the Municipal Court at the time the allegation was made in January 2008. *See* CP 81. Tacoma News also misstates the impetus for the Stephson Report, incorrectly stating that "it is clear that the report is an investigation into work place harassment." Tacoma News's Br. at 3 (citing CP 37). This is neither accurate nor is it "clear" from CP 37. The "complaint" that spawned the Stephson Report is not in the record. Judge Morgan's declaration refers to "a court clerk mention[ing] ongoing stress and a hostile workplace environment following a counseling session scheduled by the Court," CP 11, City Attorney Richardson's declaration states that "after an Employment Assistance Program session for all of the court clerks, a court employee complained to the City about hostile work conditions at the court," CP 70-71, and the Stephson Report itself only refers to "an allegation of 'ongoing stress/hostile work environment," CP 161.

The Executive Branch goes so far as to argue that Richardson's decision to disregard Judge Morgan's instruction to terminate Stephson's investigation "shows that the report was prepared for the [Executive Branch], not the Municipal Court." Executive Branch's Br. at 23. Richardson's decision to ignore Judge Morgan's instruction does no such thing. Any confusion by Richardson as to who her client was does not convert the Stephson Report into Executive Branch property. Along these lines, the Executive Branch's assertion that Richardson "only asked Judge Morgan if he objected to the [Stephson] investigation" and "did not ask his permission," *see id.* at 22, is also mistaken. In fact, when she retained Stephson, Richardson did not purport to act without Judge Morgan's permission; rather, she "assume[d]" that Judge Morgan was "agreeable" to retaining Stephson since he had not responded to her January 17 memorandum. CP 191. Judge Morgan explicitly authorized Stephson's investigation in an in-person meeting with Richardson. *See* CP 11-14, 81.[12] Moreover, "[n]either Ms. Stephson nor Ms. Richardson gave any

[12] Judge Morgan did not know about City Attorney Richardson's recommendation that Stephson be retained until January 22. Although Richardson's initial memorandum to Judge Morgan was dated January 17, Judge Morgan did not receive that memorandum until Richardson handed it to him on January 22 *after* he read her January 22 email to him. *See* CP 81. Moreover, when they spoke in person on January 22, Judge Morgan orally authorized Richardson "to go ahead and retain the lawyer [Stephson] on behalf of the court." *Id.* Richardson does not dispute Judge Morgan's account of this conversation; she simply identifies the January 17 memorandum and the January 22 email without stating when Judge Morgan actually

indication that they believed [Judge Morgan] had no authority to end the investigation," and, "[b]y requesting [Judge Morgan's] consent, Ms. Richardson had given every indication that [Judge Morgan] had authority to authorize the investigation." CP 82.[13]

Although the Executive Branch does not explicitly make this argument, it implies that the Stephson Report should be considered an Executive Branch document because City Attorney Richardson might have *thought* she was acting on behalf of the Executive Branch.[14] It is possible that Richardson did not understand the non-delegable workplace responsibility and authority GR 29(f) gives to Presiding Judge Morgan. If she did not understand GR 29(f), it is also possible Richardson did not

---

received the January 17 memorandum or referencing their in-person conversation on January 22. *See* CP 71.

[13] The Executive Branch suggests that the January 17 memorandum's use of the phrase "for the Court and for the City" "gave Judge Morgan notice that the City was at least in part conducting the investigation for the City's distinct interest." Executive Branch's Br. at 25-26; CP 189. This is wrong for at least two reasons. First, City Attorney Richardson never provided Judge Morgan notice of any joint representation or sought "informed consent, confirmed in writing" as required by RPC 1.7(b)(4). Second, Richardson's email was sent only to Judge Morgan; no Executive Branch officials were copied on that communication or any other communications Judge Morgan received from Richardson regarding Stephson's investigation.

[14] "[T]he existence of the attorney-client relationship turns largely on the client's subjective belief that it exists," not the attorney's subjective belief. *In re Egger*, 152 Wn.2d 393, 410, 98 P.3d 477 (2004) (internal citations omitted). Judge Morgan reasonably believed that the Municipal Court was City Attorney Richardson's client for purposes of the Stephson investigation and report. *See, e.g.*, CP 14-15, 80-81. There is no testimony in the record indicating that any member of the Executive Branch believed Richardson was acting as the Executive Branch's attorney in connection with Stephson's investigation and report.

understand that she was legally required to act exclusively as the Municipal Court's attorney when she retained Stephson to investigate and analyze the Municipal Court's workplace. Indeed, because the Municipal Court was her only client in connection with the Stephson investigation and report, Richardson acted improperly when she disobeyed the direct instruction of her client's legal decision-maker—Presiding Judge Morgan—and asked Stephson to prepare her report.

Despite City Attorney Richardson's apparent failure to understand the operation of GR 29(f) and properly determine the identity of her client in connection with Municipal Court workplace issues, the Stephson Report remains a Municipal Court document. Even if Richardson mistakenly thought she was also acting as the Executive Branch's attorney in connection with the Stephson Report, neither her communications with Judge Morgan, *see* CP 189, 191, nor anything else in the record suggests that she gave a copy of the Stephson Report to the Executive Branch. An attorney's possible client-identification error cannot negate the plain language of GR 29(f), and it does not change the nature of a document that rightfully belongs only to one client—the Municipal Court. As such, the Stephson Report is exclusively a Municipal Court document and is not subject to the PRA.

B. Even if it is a "public record," the Stephson Report is exempt from disclosure under the PRA.

1. The Stephson Report is protected from disclosure as work product.

The Executive Branch asserts that "Stephson's investigation and her report were conducted and prepared pursuant to the City's Anti-Harassment Policy as part of the City's duty to promptly investigate a claim of hostile work environment." Executive Branch's Br. at 26. This might be the Executive Branch's after-the-fact explanation of how the Stephson Report came to be, but, at the time City Attorney Richardson retained Stephson and over the course of the following month, Richardson stated that the purpose of Stephson's investigation and report was to *defend* the Municipal Court in possible litigation. *See* CP 189, 279, 399, Judge Morgan's Supp. Memorandum ¶ 2. This Court should credit Richardson's written characterization of Stephson's investigation in January and February 2008, not the Executive Branch's subsequent attempt to recharacterize Stephson's investigation and report as something other than work product.

Judge Morgan offered essentially the same reasons for authorizing Stephson's investigation: "I authorized Ms. Stephson's investigation in anticipation of potential litigation in order to evaluate the legal exposure of the Court and to evaluate possible settlement packages in lieu of

potential litigation." CP 13. Judge Morgan also noted that "[i]n January and February [2008], there were two litigation attorneys involved representing former court personnel interfacing with the Court and the City" and that "Stephson's report appeared to me to be related to and an extension of these on-going issues which have been protected by attorney-client privilege." CP 12.

Given Richardson's contemporaneous explanation and Judge Morgan's explanation for retaining Stephson—to conduct an investigation as a *defense* in possible litigation—the Stephson Report is protected as work product. Furthermore, later in its brief, the Executive Branch acknowledges that the Stephson Report was a *Faragher-Ellerth* report (a type of report that would only be prepared if litigation was anticipated as a possibility), *see* Executive Branch's Br. at 30, before turning around and once again arguing that "the Stephson Report was created in the ordinary course of business, not in anticipation of litigation," *id.* at 33.

To support its after-the-fact assertion that the Stephson Report was prepared "in the ordinary course of business," the Executive Branch cites its answer to Judge Morgan's petition for protective order and City Attorney Richardson's declaration filed in opposition to the petition for

protective order. *See id.* at 34 (citing CP 47, 70-71).[15] These two documents are dated March 10 and March 17, 2008. *See* CP 49, 72. In contrast to the Executive Branch's after-the-fact revisionism, Richardson's January 17, 2008 memorandum and February 25, 2008 email to Judge Morgan both demonstrate that the Stephson Report was prepared in anticipation of litigation. *See* CP 189, 279, 399.

Respondents cite three cases in opposition to Judge Morgan's work product argument, none of which apply. The Executive Branch cites *Payton v. New Jersey Turnpike Authority*, 691 A.2d 321, 148 N.J. 524 (1997), and *Soter v. Cowles Publishing Co.*, 131 Wn. App. 882, 130 P.3d 840 (2006) ("*Soter I*"), *aff'd* 162 Wn.2d 716, 174 P.3d 60 (2007) ("*Soter II*"). In *Payton*, unlike in this case, the defendant employer not only conducted an investigation and prepared a report regarding workplace issues, it asserted that investigation as an affirmative defense in a court proceeding. *See Payton*, 691 A.2d at 325. "When a party relies on work product as a basis for a claim or defense, the protection is waived." Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product*

[15] Tacoma News makes essentially the same argument as the Executive Branch, except that Tacoma News cites CP 279 in support of its argument. *See* Tacoma News's Br. at 16-17. CP 279 is a letter City Attorney Richardson wrote to Judge Morgan's counsel on March 3, 2008. While Richardson stated that "[t]he purpose of Ms. Stephson's investigation was to gather facts in response to the allegation of a hostile work environment," in the following paragraph she made it clear that the central reason for the Stephson Report was to serve as a defense in the event of litigation. *See* CP 278-79.

Doctrine 1099 (5th ed. 2007). Here, since no litigation was ever filed, neither Stephson's investigation or report was ever relied upon or otherwise used as an affirmative defense, so work product has not been waived. In *Soter I*, where this Court found that work product protection applied, this Court simply stated that documents prepared in the ordinary course of business (and not in anticipation of litigation) are not protected as work product. *See Soter I*, 131 Wn. App. at 895-96. The Stephson Report, however, was prepared in anticipation of litigation, so it is protected as work product.

Tacoma News cites *Harding v. Dana Transportation*, 914 F. Supp. 1084 (D.N.J. 1996), to show that an employer who raises a *Faragher-Ellerth* affirmative defense is subject to discovery regarding that affirmative defense. *See* Tacoma News's Br. at 16. Judge Morgan does not dispute that a party waives work product protection if material ordinarily constituting work product is relied upon to support an affirmative defense. As explained, however, this case is different—no *Faragher-Ellerth* affirmative defense has been raised, so there is no waiver of work product protection.[16]

[16] Tacoma News asserts that "[Judge] Morgan argues that the work-product protection is only waived once litigation is started." Tacoma News's Br. at 17. This is not accurate. In fact, as Judge Morgan has argued, "*Faragher-Ellerth* investigation reports can become subject to disclosure in discovery *if* an employer is sued *and* chooses to raise a *Faragher-Ellerth* affirmative defense." Judge Morgan's Br. at 39-40. But "no

2. The Stephson Report is protected from disclosure as an attorney-client privileged communication.

The only material argument the Executive Branch and Tacoma News raise in opposition to Judge Morgan's attorney-client privilege claim is that the Stephson Report does not constitute "legal advice." *See* Executive Branch's Br. at 27-33; Tacoma News's Br. at 13-18.[17] As the Executive Branch explains, "[c]ommunications between an attorney and client are *not* privileged if the attorney is simply giving business or financial advice, as opposed to legal advice." Executive Branch's Br. at 27 (quoting Karl Tegland, 5A *Wash. Practice (Evidence Law & Practice)* § 501.15 (2007)). There is no dispute that "[t]he attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contain a privileged communication." *Soter II*, 162 Wn.2d at 745 (quoting *Dietz v. Doe,* 131 Wn.2d 835, 844, 935 P.2d

---

lawsuit was ever filed in this case, and, without a lawsuit, no *Faragher-Ellerth* affirmative defense was ever raised." *Id.* In other words, it is the affirmative defense—not the lawsuit—that waives work product protection. *See* Epstein, *supra*, *at* 1099.

[17] Tacoma News also argues that "the Stephson Report was intended to be released to third parties" and that "[t]o be privileged, a communication must be made with the intention of being kept confidential." Tacoma News's Br. at 14 (quoting Epstein, *supra*, at 171). In fact, the Stephson Report itself is labeled "privileged and confidential," *see* CP 161, and Judge Morgan "believed that if Ms. Stephson generated a report, it would be considered confidential . . . ," CP 82. Moreover, even City Attorney Richardson intended to keep the Stephson Report confidential at the time it was prepared. *See* CP 399. The Executive Branch is now claiming that the Stephson Report was only labeled "privileged and confidential" "because under chapter 49.30 RCW, employment investigations are confidential until completed." Executive Branch's Br. at 32 n.8 (citing RCW 42.56.250(5)). The Stephson Report, however, is also labeled "privileged," and the applicable usage of privileged does not appear in Ch. 49.30 RCW or RCW 42.56.250(5). *See also* Judge Morgan's Supp. Memorandum ¶ 3.

611 (1997)) (emphasis in *Dietz*). However, because the Stephson Report is an attorney-client communication that is not "the attorney . . . simply giving business or financial advice, as opposed to legal advice," it is privileged and therefore protected from disclosure under the PRA.

The Executive Branch cites *Payton* to support its assertion that the Stephson Report is not privileged. *See* Executive Branch's Br. at 29. This citation is misplaced for at least two reasons. First, as with the Executive Branch's reliance on *Payton* in its work product argument, *Payton* is different than this case because the defendant in *Payton* was sued and raised its attorney's prior investigation as an affirmative defense in that lawsuit. *See Payton*, 691 A.2d at 325. This distinction was critical in the New Jersey Supreme Court's decision to deem the report unprivileged: "A party may not abuse a privilege, including the attorney-client privilege, by asserting a claim or defense and then refusing to provide the information underlying that claim or defense based on the privilege." *Id.* at 335 (internal citation omitted). Here, there has been no lawsuit, and Stephson's investigation or report has not been raised as an affirmative defense, so there is no "waiver" of attorney-client privilege.

The Executive Branch also asserts that, under *Payton*, Stephson did not provide "legal services." *See* Executive Branch's Br. at 29. *Payton* explains the issue as follows: "If the purpose [of the investigation]

was to provide legal advice or to prepare for litigation, then the privilege applies. However, if the purpose was simply to enforce defendant's anti-harassment policy or to comply with its legal duty to investigate and to remedy the allegations, then the privilege does not apply." *Payton*, 691 A.2d at 334. As explained, the purpose of Stephson's investigation and report was to *defend* the Municipal Court in possible litigation, making it privileged under *Payton*'s formulation. *See supra* § II.B.1, CP 189, 279, 399, Judge Morgan's Supp. Memorandum ¶ 2.[18]

Without citing the record, the Executive Branch then claims that Stephson was retained "so the City could take remedial or other action." Executive Branch's Br. at 29. This is not true. Judge Morgan, who, as Presiding Judge, was the only official with authority to take any non-wage-related action regarding the Municipal Court's workplace, "did not rely on Ms. Stephson's report to institute workplace changes." CP 83. Rather, "[t]he workplace changes the court has instituted—counseling sessions for staff, Team Building sessions with staff and court managers, and training on judicial ethics for staff by J. Reiko Callner of the

[18] In his brief, Judge Morgan explained that GR 29(f) trumps the Executive Branch's antidiscrimination policy to the extent they conflict, and, under GR 29(f), the Executive Branch cannot enforce an antidiscrimination policy requiring Executive Branch involvement in an investigation of Municipal Court working conditions. *See* Judge Morgan's Br. at 24-32.

Commission on Judicial Conduct were all initiated before Ms. Stephson's services were sought." *Id.*

Contrary to the Executive Branch's assertion that "[t]he Stephson Report contains only factual summaries" and "has no legal analysis," Executive Branch's Br. at 32, Judge Morgan "relied on Ms. Stephson's perceptions to some extent in helping craft an agreement to settle a potential legal claim against the court on February 14, 2008." CP 83. He also relied on Stephson's work "in evaluating the legal claims made by Judge Hartl in pleadings submitted to the Superior Court and in remarks attributed to Judge Hartl that were published in The News Tribune." *Id.* City Attorney Richardson likewise relied on Stephson's investigation in offering legal advice to the Municipal Court. *See* CP 393; Supp. Reply Memorandum ¶ 1. Even if Stephson were not acting as an attorney, Richardson's reliance on Stephson's investigation makes the investigation privileged. *See* Epstein, *supra*, at 356 ("[I]f the investigation was conducted . . . so that an attorney could be apprised of the underlying information so that legal advice could be given, it would be privilege protected.").

Although the Executive Branch attempts to craft the narrowest possible definition of "legal work," *see* Executive Branch's Br. at 32-33, the proper scope of an attorney's job functions is relatively broad. "A

lawyer's assistance is legal in nature if the lawyer's professional skill and training would have value in the matter." Restatement (Third) of the Law Governing Lawyers § 72 cmt. b. "So long as the client consults to gain advantage from the lawyer's legal skills and training, the communication is [an attorney-client communication], even if the client may expect to gain other benefits as well . . . ." *Id.* § 72 cmt. c. In the specific context of an attorney conducting an investigation, if "legal training, skills and background bear on analyzing, and even acquiring, the facts," an attorney-investigator is acting as an attorney. John Wm. Gergacz, *Attorney-Corporate Client Privilege* 3-50 (3d ed. 2008 supp.).

Here, it is difficult to imagine why City Attorney Richardson and Judge Morgan would have retained Stephson (who, as a licensed attorney, would likely charge a higher hourly rate than a non-attorney) to conduct an investigation and prepare a report if they did not believe Stephson's legal "professional skills and training would have value in the matter" or that her "legal training, skills and background bear on analyzing, and even acquiring, the facts." Furthermore, as discussed further in Judge Morgan's Supplemental Memorandum, Stephson provides analysis and conclusions regarding her investigation; her report contains analysis and is not merely a factual recitation of her investigation. *See* CP 161-62, 174; *see also* Judge Morgan's Supp. Memorandum ¶ 3.

Finally, the Executive Branch argues that Judge Morgan's email to his bailiff somehow establishes that Stephson was not acting as an attorney because Judge Morgan believed the scope of Stephson's investigation was limited. *See* Executive Branch's Br. at 31-32 (citing and quoting CP 195). However, the scope of an attorney's representation of a client, work on behalf of a client, and authority to act for a client, often varies from case to case. *See, e.g.*, RPC 1.2; Restatement (Third) of the Law Governing Lawyers § 21 cmt. a ("The lawyer begins with broad authority to make choices advancing the client's interests. But the client may limit the lawyer's authority by contract or instructions."). The fact that Judge Morgan intended to limit the scope of Stephson's authority and services as the Municipal Court's attorney does not negate the attorney-client relationship.[19]

3. The Stephson Report is protected from disclosure by *Bellevue John Does* and the PRA's personal records exemption.

This Court need not reach or address this "personal information exemption" argument if it agrees that the Stephson Report is a Municipal Court document not subject to the PRA *or* that the Stephson Report is

[19] Judge Morgan's use of the term "investigator" to describe Stephson in an email is similarly irrelevant. In their communications with each other, City Attorney Richardson and Judge Morgan used the terms "employment attorney" and "investigator" interchangeably. *See* CP 189 ("investigator"); CP 191 ("employment attorney"); CP 81 ("retain the lawyer on behalf of the court").

exempt from PRA disclosure as work product *or* attorney-client privilege. If, however, this Court reaches this argument, much of the Stephson Report consists of unsubstantiated allegations regarding Municipal Court personnel and is therefore also protected from disclosure under *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, __ Wn.2d __, 189 P.3d 139 (2008).[20]

Respondents raise two arguments in response to *Bellevue John Does*, both of which disregard the import of the Supreme Court's decision and the Stephson Report:

First, Respondents argue that *Bellevue John Does* is limited to "teacher privacy" issues and does not apply to "an elected, presiding judge." Executive Branch's Br. at 35-36, 38-41; Tacoma News's Br. at 18-22. The Supreme Court's decision contains no such limitation. The Executive Branch's assertion that "*Bellevue John Does* is grounded in the exemption for performance-related records," Executive Branch's Br. at 40, is also misplaced. The statute underlying *Bellevue John Does* applies to "[p]ersonal information in files maintained for employees, appointees, *or*

[20] Tacoma News observes that Judge Morgan is making this argument for the first time on appeal. *See* Tacoma News's Br. at 18. This is true. As the Executive Branch acknowledges, a party opposing production of a document in response to a public records request may raise additional arguments for the first time on appeal. *See* Executive Branch's Br. at 35 n.10. Moreover, the Supreme Court did not decide *Bellevue John Does* until after this appeal was pending, and Judge Morgan was unable to make a "personal records exemption" argument based on this Court's prior decision in the *Bellevue John Does* case.

elected officials of any public agency to the extent that disclosure would violate their right to privacy," RCW 42.56.230(2) (emphasis added); this statute is in no way limited to teachers or "performance-related records," and it *explicitly* applies to elected officials.

Second, the Executive Branch asserts that the Stephson Report's allegations are "substantiated." *See* Executive Branch's Br. at 37-38; Executive Branch's Supp. Br. at 1-7.[21] As explained in Judge Morgan's Supplemental Memorandum, however, the Stephson Report contains numerous "unsubstantiated" allegations regarding Municipal Court personnel. *See* Judge Morgan's Supp. Memorandum ¶¶ 4-6; Supp. Reply Memorandum ¶ 2-3; *see also* CP 12 ("Ms. Stephson's report is incomplete and contains many inaccuracies . . ."). And to the extent the allegations in the Stephson Report are directed against Judge Morgan, it is particularly important that unsubstantiated allegations not be released to Tacoma News. Allegations against a sitting judge should be addressed to and confidentially investigated by the CJC, an "independent agency of the judicial branch" that the Washington Constitution established as the forum for investigating and addressing complaints against sitting judges. *See* Wash. Const. art. IV, § 31. The Constitution explicitly provides that an

[21] Section 3 of Executive Branch's Supplemental Brief is essentially an editorializing summary of the Stephson Report. *See* Supp. Reply Memorandum ¶ 2.

"investigation and initial proceedings shall be confidential," *id.*, and the CJC explains that "[c]onfidentiality is intended to encourage complainants to express their concerns without fear of reprisal and to protect a judge's reputation and the integrity of the judicial process from unsubstantiated allegations." Wash. Comm'n on Judicial Conduct, Disciplinary Function, Confidentiality.[22]

4. If the Stephson Report were a public record exempt from release as work product, attorney-client privilege, or a personal record, an injunction prohibiting its release is appropriate, and the report should not be released in a redacted form.

Tacoma News argues that the Stephson Report should be released regardless of the PRA's exemptions because, in Tacoma News's opinion, "[Judge] Morgan generally ignores the requirements of showing that the disclosure is clearly not in the public's interest and would irreparably damage a person or vital government function." Tacoma News's Br. at 11. To the contrary, Judge Morgan explicitly addressed RCW 42.56.540 in his brief. *See* Judge Morgan's Br. at 45-47. Moreover, releasing the Stephson Report would not be in the public interest because the Stephson Report on its own is inaccurate and misleading. *See* Supp. Reply Memorandum ¶ 4. Tacoma News's request that the Stephson Report be released in a redacted form is also misplaced. *See* Tacoma News's Br. at

[22] *Available at* http://www.cjc.state.wa.us/Disc_function/confidentiality.htm.

26. Tacoma News cites no authority for the proposition that redaction is appropriate where the document at issue is protected by the work product doctrine or attorney-client privilege, and enjoining the Stephson Report's release is the only viable means for protecting these important doctrines.

C. Document 10 is protected by common interest privilege and should be filed under seal.

Respondents argue that the attorney-client communication Judge Morgan forwarded to Councilmember Kochmar is not protected by common interest privilege. The Executive Branch argues common interest privilege cannot apply to one member of the city council and the Municipal Court's and the Executive Branch's interests were not identical with respect to the Plenefisch Report. *See* Executive Branch's Br. at 41-42. These arguments are misplaced.

First, as explained in Judge Morgan's brief, "[w]hen two or more clients consult or retain an attorney on particular matters of common interest," the clients may share attorney-client communications with each other "without destroying either their confidentiality or the privilege protection premised upon it." 3 *Weinstein's Fed. Evid.* (2d ed. 2008) § 503.21[1]; 1 Paul R. Rice, *Attorney-Client Privilege in the United States* § 9:68 (2d ed. 1999); Judge Morgan's Br. at 48-50. Judge Morgan shared a Municipal Court attorney-client communication with a city

councilmember on a matter where the Municipal Court and the Executive/Legislative Branch had a common interest. *See* Judge Morgan's Supp. Memorandum ¶ 7. The idea that sharing the communication with one councilmember would destroy the privilege even where sharing the communication with the entire council or the City Manager would leave the privilege intact is illogical, and the facts and circumstances of *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998), are not the same as those here. *See* Supp. Reply Memorandum ¶ 5.

Second, contrary to the Executive Branch's assertion, in connection with the privileged topic discussed in Document 10, Judge Morgan (i.e., the Municipal Court) and Councilmember Kochmar (i.e., the Executive/Legislative Branch) had the same interests. *See* Judge Morgan's Supp. Memorandum ¶ 7; *see also* CP 393.

Tacoma News also suggests that, as an alternative to sealing, Document 10 simply be rejected as evidence rather than filed under seal. *See* Tacoma News's Br. at 31. Judge Morgan agrees with this suggestion—Document 10 adds no material value to any of the arguments made by the parties in this case, and removing it from the record would be an adequate alternative to filing it under seal. If, however, Document 10 remains in the record, it should be filed under seal.

III. COUNTERSTATEMENT OF ISSUE ON CROSS-APPEAL

The Executive Branch's cross-appeal raises one issue for review:

Trial courts have discretion to decide whether or not to award attorneys' fees to a party who lifts a temporary restraining order. The purpose of this rule is to deter plaintiffs from seeking unnecessary relief prior to a trial on the merits, but discouraging parties from seeking pretrial relief necessary to preserve their rights would not serve that purpose. Here, it was necessary for Judge Morgan to obtain a temporary restraining order to preserve his rights pending a hearing on the merits, and the Executive Branch was not prejudiced by the temporary order. Did the Superior Court abuse its discretion by declining to award fees to the Executive Branch?

IV. COUNTERSTATEMENT OF THE CASE ON CROSS-APPEAL

On March 5, 2008, the Superior Court entered a temporary restraining order prohibiting release of the Stephson Report, disqualifying City Attorney Richardson from appearing in this lawsuit, and setting a hearing on the merits for March 19, 2008. *See* CP 41-42. At the March 5 hearing, Judge Morgan's then-attorney mistakenly stated that they had provided the Executive Branch with notice of the motion for entry of the

preliminary order. *See* RP (Mar. 5, 2008) at 20.[23] The Executive Branch received notice of the preliminary order no later than March 6, 2008. *See* CP 72. The Executive Branch never opposed the portion of the order disqualifying Richardson. *See* CP 418. Although the Executive Branch asked the Superior Court to lift the portion of the preliminary order prohibiting release of the Stephson Report at the March 19 hearing, the Executive Branch never sought to vacate or modify the preliminary order between March 6 and the March 19 hearing. *See, e.g.*, RP (Mar. 19, 2008, Argument) at 30.

At the March 19 hearing, the Executive Branch's attorney "object[ed]" to the entry of the preliminary order without notice. RP (Mar. 19, 2008, Argument) at 30. *All* the Executive Branch did was "object"; it did not assert that it had been prejudiced or harmed in any way by the entry of the preliminary order. While the Superior Court acknowledged the Executive Branch's assertion that it did not receive notice of the preliminary order, the court stated that the notice "matter is

[23] The Executive Branch claims that "Judge Morgan's actions in the later, March 19 hearing show that this was not simply an oversight." Executive Branch's Br. at 12. There is no evidence to support that assertion—the Executive Branch's attorneys did not ask for any relief as a result of their lack of notice of the March 5 hearing, and there was no need for Judge Morgan's attorneys to respond to the Executive Branch's "objection." Furthermore, the Executive Branch's reference to "Judge Morgan's actions" is misleading—Judge Morgan did not personally appear at either the March 5 or March 19 hearing, and all statements made to the Superior Court regarding notice were made by Judge Morgan's then-attorneys.

moot at this point, the parties have notice now." RP (Mar. 19, 2008, Decision) at 5.

On April 7, 2008, the Executive Branch filed a cost bill asking the Superior Court to tax its legal fees as an element of costs against Judge Morgan. *See* CP 408-09. Judge Morgan filed a motion to retax, which the Executive Branch opposed and the Superior Court granted. *See* CP 410-31. The Executive Branch appealed this order. *See* CP 432-36.

V. ARGUMENT ON CROSS-APPEAL

As a threshold matter, the Executive Branch's cross-appeal is irrelevant and need not be addressed if this Court reverses the Superior Court and protects the Stephson Report from disclosure. If this Court reverses, the Superior Court's temporary order would not have been "improper," and there would be no basis for awarding fees to the Executive Branch.

Even if this Court affirms the Superior Court on Judge Morgan's appeal, there is no basis for reversing the Superior Court and awarding fees. The abuse of discretion standard of review is central to this issue: "Discretion is abused only if the trial court's decision is manifestly unreasonable or is based on untenable reasons or grounds." *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) (internal quotation omitted). Here, the Superior Court applied the proper legal standard in

exercising its discretion, and there is simply no tenable basis for finding that its "decision is manifestly unreasonable" or "untenable."

In *Confederated Tribes of Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 958 P.2d 260 (1998), the Supreme Court held that "attorney fees *may* be awarded to a party who prevails in dissolving a wrongfully issued injunction or, as here, temporary restraining order." *Id.* at 758 (internal citations omitted, emphasis in original). This equitable award is discretionary, not mandatory. *See id.* The Supreme Court explained that "[t]he purpose of the rule permitting recovery for dissolving a restraining order is to deter plaintiffs from seeking relief prior to a trial on the merits." *Id.* While courts disfavor pretrial relief, sometimes temporary pretrial relief is necessary to preserve a party's rights prior to trial or a hearing on the merits. Consequently, "[t]he purpose of the rule would not be served where injunctive relief prior to trial is necessary to preserve a party's rights pending resolution of the action." *Id.* As a result, the Supreme Court affirmed the trial court's order denying fees to a public records requestor on the grounds that "the trial on the merits would have been fruitless if the records had already been disclosed." *Id.*

This case is virtually identical to *Confederated Tribes*. There is no dispute that Judge Morgan's petition for protective order would have been "fruitless" if the Stephson Report was disclosed to Tacoma News before a

hearing on the merits, and it is undisputed that the Executive Branch planned to release the Stephson Report on March 6 if Judge Morgan did not obtain a court order prohibiting the report's release. *See* CP 72. As such, a temporary order protecting the Stephson Report from disclosure was necessary to preserve Judge Morgan's ability to present his case at a hearing on the merits, and it was well within the Superior Court's discretion to decline to award attorneys' fees to the Executive Branch.

The only distinction between this case and *Confederated Tribes* is the "notice" issue, and the Executive Branch does not explain how any lack of notice makes the Superior Court's denial of fees an abuse of discretion. The Executive Branch does not even make a serious attempt to explain how it could have been prejudiced or harmed in any way as a result of the *ex parte* preliminary order. Rather than explaining how it could have been prejudiced, the Executive Branch simply argues that the March 5 order "disqualif[ying] the City Attorney from representing the City of Federal Way . . . forced the City to expend taxpayer funds to hire outside counsel." Executive Branch's Br. at 12. While technically accurate, this is not evidence of "prejudice" to the Executive Branch. The Executive Branch has *never* challenged or in any way contested the order disqualifying City Attorney Richardson (presumably because Richardson's conflict of interest was obvious to the Executive Branch by

March 5, 2008), so the Executive Branch would have hired outside counsel whether or not it had received notice of the March 5 hearing. *See* CP 418.

The Executive Branch also asserts that the Superior Court's denial of fees creates a "blanket prohibition" "that would bar an award of attorney fees in all PRA cases." Executive Branch's Br. at 43. The Superior Court's ruling does no such thing. However broad or narrow a legal rule the Supreme Court might have created in *Confederated Tribes*, in this case, the Superior Court "[a]ssum[ed] that *Confederated Tribes* did not overrule *Seattle Firefighters* [*Union v. Hollister*, 48 Wn. App. 129, 737 P.2d 1302 (1987),] and that the court retains discretionary ability to award attorneys' fees when dissolving a restraining order when the restraining order was necessary to preserve a party's rights in a public records case . . . ." CP 431. Given that assumption, the Superior Court *exercised its discretion* to determine that "Judge Morgan should not be ordered to pay attorneys' fees as the price of obtaining a restraining order in order to preserve his rights pending resolution of the action." *Id.* The Superior Court's order was an exercise of discretion, not a "blanket rule."

Finally, the Executive Branch cites several other cases addressing the issue of attorneys' fees. *See* Executive Branch's Br. at 44-48. It is not clear how any of these cases are relevant, as not one of these cases

involves an appellate court holding that a trial court abused its discretion in denying attorneys' fees. *See Seattle Firefighters Union v. Hollister*, 48 Wn. App. 129 (affirming a trial court's discretionary award of fees); *Spokane Police Guild v. Washington State Liquor Control Board*, 112 Wn.2d 30, 769 P.2d 283 (1989) (stating that fees "may" be awarded); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154 (1997) (affirming a trial court's discretionary decision to award fees); *Cornell Pump Co. v. City of Bellingham*, 123 Wn. App. 226, 98 P.3d 84 (2004) (affirming a trial court's discretionary award of fees); *Quinn Constr. Co. v. King County Fire Prot. Dist.*, 111 Wn. App. 19, 44 P.3d 865 (2002) (affirming a trial court's discretionary award of fees). In short, there is no "blanket rule" at issue here, and, under *Confederated Tribes*, the Superior Court was well within its discretion in denying the Executive Branch's request for attorneys' fees. This Court should affirm the Superior Court's discretionary denial of fees.

VI. CONCLUSION

The Stephson Report is a Municipal Court document, not a public record, and it is not subject to the PRA. Even if it is subject to the PRA, the Stephson Report is exempt from disclosure as either work product, attorney-client privilege, or a personal record. This Court should reverse the Superior Court and protect the Stephson Report from disclosure in

response to public records requests. This Court should also file Document 10 under seal or, alternatively, strike it from the record. Finally, this Court should affirm the Superior Court's order denying attorneys' fees to the Executive Branch.

RESPECTFULLY SUBMITTED, this 16th day of September, 2008.

DORSEY & WHITNEY LLP

By _____
John B. Schochet
WSBA No. 35869
Attorneys for Petitioner/Appellant Michael F. Morgan, Presiding Judge of the Municipal Court of Federal Way

DECLARATION OF SERVICE

On September 16, 2008, I caused true and correct copies of the Reply Brief of Appellant and Brief of Cross-Respondent to be served on the following counsel of record via U.S. Mail and e-mail (by consent):

P. Stephen DiJulio
Ramsey Ramerman
FOSTER PEPPER PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Attorneys for Respondents the City of Federal Way and the City Attorney of Federal Way

James Beck
GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM LLP
Wells Fargo Plaza
1201 Pacific Avenue, Suite 2100
Tacoma, Washington 98402

Attorneys for Intervenor Tacoma News, Inc. d/b/a/ The News Tribune

On September 16, 2008, I caused a true and correct copy of Appellant's [Proposed] Supplemental Memorandum in Support of Reply Brief to be served on P. Stephen DiJulio and Ramsey Ramerman of FOSTER PEPPER PLLC, 1111 Third Avenue, Suite 3400, Seattle, WA 98101-3299, attorneys for Respondents, via U.S. Mail and e-mail (by consent). I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of September, 2008.

Sally Jarvis